Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–67 OF 2000
FAIZA TAMBY CHIK J
26 FEBRUARY 2001

Arbitration *— Arbitrator — Misconduct — Setting aside of award — Failure to consider admissible evidence — Errors of law on face of the record — Whether arbitrator applied principles not permitted or recognized by law — Whether arbitrator guilty of misconduct*

The claimant had applied under the notice of motion that the award made and published by the arbitrator on 16 June 2000, be set aside on the grounds that the arbitrator had misconducted himself when he committed 'errors of law on the face of the record'. It was submitted that the arbitrator's construction of cl 26(1)(a) of the PAM form of contract was based on a principle of construction not countenanced by law, and he further 'applied principles not permitted or recognized by law'. The arbitrator also held that the respondent had lawfully determined the contract under cl 26(1)(a).

Held, allowing the application:

(1) In construing cl 26(1)(a), the arbitrator had failed to consider clear evidence of payment arrangement under the factoring arrangement and between the claimant and the respondent. The arbitrator, in coming to his findings, ignored admissible evidence. The arbitrator's construction of the respondent's notice under cl 26 as an effective notice was an error on the face of the record because it was based on a principle of construction not countenanced by law (see pp 730H, 731A–B); *Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 1 MLJ 621 followed.

(2) The arbitrator in his finding of determination was guilty of misconduct because he failed to analyze and appraise material and relevant evidence which affected the award (see p 731G); *Syarikat Pemborong Pertanian dan Perumahan v Federal Development Authority* [1971] 2 MLJ 210 followed. He further failed, refused or neglected to deal with the submission of the claimant on this vital issue of the validity of determination which was pivotal to determine which party was liable. Alternately, he failed to decide on all matters referred to him (see p 732A).

(3) The arbitrator was guilty of misconduct in failing to deal with the claimant's submission on the legal point of estoppel which was intimately connected to the issue if whether the respondent had lawfully determined its contract of employment. This went to the root issue of liability (see p 732C).

(4) The arbitrator failed to perform the essential duties cast on him as an arbitrator, failed to observe rules of natural justice in arriving at his award and had shown bias, impartiality and irregularity of action which went against the principle of equity and good conscience. In the above premise, the arbitrator was guilty of misconduct, resulting in a substantial miscarriage of justice and his award was set aside under s 24 (2) of the Arbitration Act 1952 (see p 736B–C).

[**Bahasa Malaysia summary**

Pihak yang menuntut telah memohon melalui notis usul bahawa award yang dibuat dan yang telah diterbitkan oleh penimbangtara pada 16 Jun 2000 diketepikan oleh kerana penimbangtara tersebut telah melakukan salah laku apabila beliau melakukan 'kesilapan undang-undang pada zahir rekod' (errors of law on the face of the record). Ia telah dihujahkan bahawa pentafsiran oleh penimbangtara kl 26(1)(a) perjanjian biasa PAM adalah berdasarkan prinsip tafsiran yang tidak disokong oleh undang-undang, dan beliau juga 'memakai prinsip-prinsip yang tidak dibenarkan atau diiktiraf oleh undang-undang' (applied principles not permitted or recognized by law). Penimbangtara tersebut juga telah memutuskan bahawa responden telah menamatkan perjanjian tersebut dengan sah di bawah kl 26(1)(a).

Diputuskan, membenarkan permohonan tersebut:

(1) Dalam mentafsirkan kl 26(1)(a), penimbangtara telah gagal untuk memberi pertimbangan kepada keterangan yang jelas mengenai aturan bayaran di bawah pemfaktoran dan di antara pihak yang menuntut dan responden. Penimbangtara, di dalam membuat penemuannya, tidak menghiraukan keterangan yang boleh diterima. Tafsiran notis responden di bawah kl 26 oleh penimbangtara sebagai notis yang berkesan adalah kesilapan pada rekod kerana ia berasaskan prinsip yang tidak disokong oleh undang-undang (lihat ms 730H, 731A–B); *Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 1 MLJ 621 diikut.

(2) Penimbangtara, dalam penemuannya mengenai penamatan telah melakukan salah laku kerana beliau gagal menganalisakan dan mempertimbangkan keterangan yang mapan dan relevan yang mempengaruhi award tersebut (lihat ms 731G); *Syarikat Pemborong Pertanian dan Perumahan v Federal Development Authority* [1971] 2 MLJ 210 diikut. Beliau seterusnya gagal, enggan atau lalai memberi pertimbangan kepada hujah pihak yang menuntut mengenai isu sama ada penamatan adalah sah, yang amat penting untuk menentukan pihak yang bertanggung-jawab. Sebagai alternatif, beliau gagal untuk memutuskan segala perkara yang dirujuk kepadanya (lihat ms 732A).

(3) Penimbangtara telah melakukan salah laku kerana gagal memberi pertimbangan kepada hujahan pihak yang menuntut di atas perkara undang-undang estopel, yang berkait dengan isu sama ada responden telah menamatkan perjanjian pekerjaannya dengan betul di sisi undang-undang. Isu ini merupakan dasar bagi menentutkan isu liabiliti (lihat ms 732C).

(4) Penimbangtara telah gagal melakukan kewajipannya sebagai penimbangtara, gagal mematuhi rukun-rukun keadilan asasi dalam memberi award tersebut dan telah menunjukkan berat sebelah dan bertindak di luar aturan yang bercanggah dengan prinsip ekuiti dan nurani. Pada premis tersebut, penimbangtara telah melakukan salah laku yang mengakibatkan salah laksana keadilan yang penting dan awardnya diketepikan di bawah s 24(2) Akta Timbangtara 1952 (lihat ms 736B–C).

Notes

For a case on the misconduct of an arbitrator, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 901.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 AMR 2871 (refd)

Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80 (refd)

FR Absalom Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592 (refd)

Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd [2000] 1 MLJ 621 (folld)

Government of Sarawak v Sami Mousawi-Utama Sdn Bhd [2000] 6 MLJ 433 (refd)

Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd [1986] 1 CLJ 417 (refd)

Official Assignee v Chartered Industries of Singapore Ltd [1978] 2 MLJ 99 (refd)

Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor [1957] MLJ 231 (refd)

Syarikat Pemborong Pertanian dan Perumahan v Federal Development Authority [1971] 2 MLJ 210 (folld)

Legislation referred to

Arbitration Act 1952 s 24(2)

Ernest Azad (*Ernest Azad & Associates*) for the applicant.
Suria Kumar (*Suria Kumar & Co*) for the first respondent.
David Hoh (*Lim & Hoh*) for the second respondent.

Faiza Tamby Chik J:. The claimant applied under the notice of motion that the award of the second respondent that the arbitrator made and published on 16 June 2000 be set aside on the grounds that the arbitrator is guilty of misconduct. It is contended that the arbitrator has misconducted himself when he committed 'errors of law on the face of the record'. It is submitted that the arbitrator's construction of cl 26(1)(a) of the PAM form of contract was based on a principle of construction not counternanced by law, and he further 'applied principles not permitted or recognized by law'. The arbitrator held that the respondent had lawfully determined the contract under cl 26(1)(a), and the relevant part of which states if 'the employer does not pay to the contractor the amount due on any certificate within the period for honouring certificates named in the appendix to these conditions, and continues such default for seven days after receipt by registered post … of a notice from the contractor stating that the notice of determination under this condition will be served if payment is not made within seven days of the receipt thereof; then the contractor may thereupon by notice by registered post … to the employer or architect forthwith determine the employment of the contractor under this contract; provided that such notice shall not be given unreasonably or vexatiously'. I think the arbitrator's construction of this clause in the light of the payment arrangements occasioned by the factoring agreement between the respondent and Showa Factoring is untenable (see *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592). The arbitrator concluded that the claimant had defaulted in honouring payments for claims 6, 7 and 8 due to delay in payment, and it had defaulted in honouring payments for claims 9, 10 and 11 due to non-payment. I am of the view that this is a total misconstruing of the financial arrangements the parties had entered. For the said certificates, the respondent received payment from Showa under the factoring agreement, not from the claimant. Under the agreement, the respondent received 80%, the balance being received from the factor upon the claimant settling the full invoiced sum with the factor. The respondent did not cite the claimant's delay in paying the factor as a ground for determining the contract. Instead, the respondent stated in his notice that the claimant had defaulted in payment of the interim certificates 9 and 20, amounting to RM822,681.28 (BHT–7, p 194 of the claimant's affidavit). This is incorrect, the respondent knew that there were delays and that was the reason both the claimant and the respondent agreed to split equally the interest charges. This was admitted in evidence by the respondent's witness, and evidenced in a document marked CD9, which was produced in evidence at the arbitration and received and marked as an exhibit. In constructing cl 26(1)(a), the arbitrator failed to consider clear evidence of the payment arrangement under the factoring arrangement and between the claimant and the respondent. The arbitrator, in coming to his findings, ignored admissible evidence.

The respondent's notice under cl 26(1)(a) (p 194 of the affidavit marked as exh BHT–8) is incorrect. There was no default in the payment of RM822,681.28 to the respondent. This was the sum owed by the claimant to Showa. The outstanding amount due to the respondent from

Showa at the material time or from the claimant subsequently was only 20% of this sum. In any event for the subsequent claim No 12, the respondent accepted direct payment from the claimant who paid in full. This put an end to the factoring agreement. The respondent's notice of 10 December 1997 is therefore defective and ineffectual. The arbitrator's construction of this clause as an effective notice is an error on the face of the record because it is based on a principle of construction not countenanced by law (see *Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 1 MLJ 621).

The arbitrator had also misconducted himself when he failed to take into consideration the submission of the claimant that the notice of determination dated 18 December 1997 is ineffective in law as it was not sent by registered post (see p 196, exh BHT9(a)). The respondent admitted therein that their date of determination of contract was 18 December 1997. The arbitrator then selected another letter dated 19 December 1997 as the correct notice of determination. The arbitrator was biased in carrying out the exercise of selectively choosing evidence to support his finding that the respondent had properly determined his contract of employment. The claimant in his submission on law, referred to the proviso to cl 26(1), which states that the determination of the contract of employment 'shall not be given unreasonably or vexatiously'. The notice of 18 December 1997, apart from being defective in its form, is in breach of these provision because the respondent did receive payment from Showa as well as the claimant for Certificate No 12. The 20% withholding of the certified sum by Showa did not provide the respondent with a right to determination because that was a term of the contract between Showa and the respondent which the respondent was aware of at all times. The respondent did not claim the balance of 20% from the claimant in his notice. The claimant, submitting on clear evidence, stated the position in law that there must be an absolute refusal on the part of the claimant to perform his part of the contract, ie to make payments. The fact that money was still owing to the factor is not the same as the respondent not being paid; it was paid with a balance of about 20% outstanding. There was no evidence of the claimant absolutely refusing to pay the respondent for works done. The claimant was in fact concerned that the works be completed expeditiously. The issue of payment to Showa at the point of the respondent determining the contract does not arise as the said contract was no longer in force when the respondent accepted payment for the following (12) certificate directly from the claimant. The arbitrator in his finding on the determination, is guilty of misconduct because he failed to analyze and appraise material and relevant evidence which affected the award (see *Syarikat Pemborong Pertanian dan Perumahan v Federal Development Authority* [1971] 2 MLJ 210). In *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* [2000] 6 MLJ 433, it was further held at pp 450–451:

> That was a serious failure to analyse and appraise material and relevant evidence which justifies the setting aside of the award (see p 450E–F) …
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> The award was therefore based on a principle of construction which the law does not countenance and thus on this ground … the award should be set aside.

He further failed, refused or neglected to deal with the submission of the claimant on this vital issue of the validity of determination which is pivotal to determine which party is liable. Alternately, he failed to decide on all matters referred to him. In *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99, the court held at p 99:

> (1) in this case the arbitrator had failed to decide on all matters or issues referred to him and in particular he had failed to decide the very questions submitted to him whether or not the notice of termination and the termination of the agreement was good or bad;
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> (3) the award was uncertain how it had decided the matters referred and was therefore invalid and must be set aside.

The arbitrator is guilty of misconduct in failing to deal with the claimant's submission on the legal point of estoppel which is intimately connected to the issue of whether the respondent had lawfully determined its contract of employment. This goes to the root issue of liability. The claimant had submitted that the fact that the respondent received direct payment on Certificate No 12 (admitted by the respondent) is crucial to the issue of whether the respondent had wrongly determined the contract of employment under cl 26 of the PAM contract (p 126 of the claimant's affidavit, paras 4.6 and 5.3). The claimant further submitted that the 'respondent received full payment on Certificate No 12 directly from the claimant before the notice of determination dated 10 December 1997'. The respondent is therefore now estopped from reverting to certificates 9 and 10 (where payment was, in fact, received from the factor) as a basis for determining the contract. The notice determining the contract dated 19 December 1997 (CD 2/83) is therefore of no legal effect as it had been given unreasonably and vexatiously by the respondent after it had received full payment on the previous Certificate No 12 (p 130 of claimant's affidavit). The claimant further submitted on the issue that the respondent is estopped from complaining about receiving 80% of invoiced sum as the respondent knew this as a term of the contract with Showa (p 135, para 2 of claimant's affidavit). The arbitrator failed to consider and deal with the claimant's submission on this important issue of estoppel, and thereby is guilty of misconduct. The award does not deal with this submission at all. In *Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor* [1957] MLJ 231 at pp 232–233, Thomson J said:

> With regard to the contention of the applicants that certain observations of the arbitrator in his summary suggested that he did not think he had power to decide any questions of law and, in fact, he did not, Thomson J said that the onus was on the applicants to shew that such was the case, for it must be presumed, until the contrary is shewn, that the 'award is made upon all the matters referred, unless it is apparent on the face of it that it is not so made'.
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> *Reg v The Metropolitan Railway Co Hen* then held that the arbitrator had failed to decide the question of limitation and the whole of the question of costs and said:
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> 'This regrettable failure on the part of the arbitrator to consider the question of limitation may be looked at in one of two ways. It may be

taken to shew that he has not finally disposed of all the matters referred to him or it may support the contention that there is an error of law on the face of the award, that error lying in the implicit proposition that the sublessee is entitled to renewal irrespective of whether or not limitation has run against him. It is not, however, necessary to take the point further for whichever view is taken the result is that the award is pro tanto bad and something will have to be done about it.

From the foregoing critical exegesis of the award it follows that it is bad for two reasons. The first is that by reason of the arbitrator's refusal to consider the question of limitation there is either an error of law on the fact of it or a failure on the part of the arbitrator to consider the whole of the questions referred to him. The second is that the failure of the arbitrator to deal with the question of costs amounts to misconduct.

The award, therefore cannot stand and the only question that remains for me to decide is whether it should be set aside or remitted.'

The contractual period for the whole project is 18 months, as mutually agreed by the parties (see p 2, claimant's affidavit). This letter of offer where the contractual period was amended from 15 months to 18 months was countersigned by representatives from both parties. This document was in the admitted bundle of documents. The arbitrator in his order dated 22 September 1998 (p 42 of the claimant's affidavit), at para 4, stated that admitted documents are documents where the contents are admitted by both parties. However, in the award, he failed to consider this admission as to the completion period. Instead in his award, the arbitrator came to a finding that the revised completion period was 18 months for each block from the actual date of possession of the site for each block. Furthermore, the respondent subpoenaed the architect as its witness. The said witness produced document RD26 (see p 109–110 of the claimant's affidavit). At para 3(a) and (b), the contractual commencement and completion as stated, which is the same as that in the letter of offer. The arbitrator in his award referred to RD26, para 3(c) and (e) only. He failed to refer to para 3(a) and (b). He also failed to refer to evidence led by the claimant that the original contractual period of 15 months was in fact extended to 18 months because the claimant had agreed that this extension was necessary because all the blocks were not handed over at the same time. The arbitrator concluded that the claimant and respondent had negotiated and eventually agreed to a revised date for completion for each block to be 18 months from the actual date of possession of site for each block. The arbitrator arrived at this conclusion by (i) failing to consider the admitted document (p 2), the minutes of the coordination meeting p 204 and RD26 para 3(a) and (b) (see p 211 of the claimant's affidavit) and oral evidence during the proceedings. Further, there is no evidence of the parties agreeing on the said completion period of 18 months for each block. The arbitrator therefore failed to analyze and appraise relevant material and relevant evidence, which is an instance of acting in bad faith and a breach of natural justice, equity and good conscience.

The arbitrator, in allowing the respondent's counterclaim, had failed to decide on facts pursued in evidence and the written submission of the

applicant and thereby committed a breach of natural justice. In allowing the 14 progress claim submitted after the respondent had stopped work and issued the impugned notice of determination, the arbitrator totally neglected to consider the application of cl 26(a)(b) read together with cl 11(4) of the PAM conditions of contract. The arbitrator allowed in totality claim No 14, submitted by the respondent, ignoring the method of evaluation as provided by the PAM condition of contract. The architect allowed interest of 8% on the 'loss' of materials and machinery for direct loss and/or damages. This allowance of interest is a clear error of law on the face of the record because the respondent, during the arbitral hearing, did not give evidence to justify interest at 13% nor the arbitrator giving reasons for justification of the interest rate at 8%, in his award. The arbitrator's misconduct in failing to meticulously determine his role of appraising evidence is clear when he even allowed interest for transport charges under what he classified as category I machinery (see pp 103 and 110). The arbitrator inferred that for certificates 6, 7 and 8, the claimant, in not paying Showa within 60 days, prevented the respondent from receiving the balance of 20% from Showa in time, thereby affecting its cash flow. No evidence was adduced by the respondent that this had affected its cash flow at the material time during the proceedings, nor was this pleaded in its defence and counterclaim. The arbitrator has thus misconducted himself in basing his findings on unpleaded and unsubstantiated evidence.

The respondent contended that the applicant had failed to make 'full, frank, candid and honest disclosure of all relevant facts'. The facts as elicited in the exhibits speak for themselves. The applicant contended that the arbitrator had misconducted himself, and the question raised in respect of RM5,469.04 is part of the findings of the arbitrator. The arbitrator did rightly state that he dismisses this amount claimed by the respondent. This is not entirely incorrect. Firstly, the respondent did not, in his counterclaim, claim this sum as a separate head of claim. Secondly, the arbitrator had not discounted this sum of money from the interests he had calculated to be owing by the claimant to the respondent in his award. This is clearly seen in the award itself (see exh BHT–7, p 109, encl 2). The statement in para 45 of the applicant's affidavit (encl 2) is correct on the facts. The case of *Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd* [1986] 1 CLJ 417, cited by the respondent has no application under the present circumstances. Therefore, the respondent's complaint on lack of full and frank disclosure has no basis. The respondent further ignored para 43 of encl 2 when the arbitrator allowed interest even on transport charges. The arbitrator in para 10.5 of his award (p 115 of encl 2) accepts the evidence of CW1 (the applicant's witness) that the applicant/claimant did agree to bear half of the interest charges. This evidence is supported by a document DC 9, exh BHT–5 (encl 2). This was admitted during the proceedings and it confirms CW1's material evidence in respect of 'finance and related charges', and yet the arbitrator rejects this document on account of it being unsigned. The issue of sharing of interest charges between the applicant and the first respondent is material because it goes toward showing that the parties had anticipated that strict 60 days repayment to Showa may not be

applicable for all interim payments. Under these circumstances, the arbitrator's finding that 60 days payment is a strict term of the contract is unfounded. The award is thus 'uncertain of how it had decided the matters referred, and is therefore invalid and must be set aside'. See *Official Assignee v Chartered Industries of Singapore Ltd*.

The applicant contends that the error arose when the arbitrator gave a construction to cl 27(1)(a) of the PAM conditions of contract because he had applied principles not permitted or recognized by law which is as follows: he came to the conclusion that the first respondent had rightly determined the contract because he had cash flow problems. Cash flow problem is not a ground for determination of the contract of employment; refusal of payment to the contractor coupled by an absolute refusal to perform the building contract by the applicants. There is no evidence that the applicant refused to perform his part of the contract in effecting payment to the first respondent. The notice of determination was also wrong in law in terms of procedure. The first respondent, in his notice of determination dated 18 November 1997, stated 'our date of determination of contract is on 18 December 1997', ie from date of the letter. This is an affirmation of determination. This notice is not by registered post (see exh BHT–9(a), encl 2). The first respondent then sends another notice purportedly by AR registered mail, but also includes the word 'By Hand' (see exh BHT–9(b), encl 2). This is acknowledged as received by the claimant. The arbitrator, in his award, rejects exh BHT–9(a) and accepts BHT–9(b). What was the rationale in doing so and in ignoring admission by the first respondent in his own notice as to the date of determination? In *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80, the court held that 'any formal or procedural requirement in the determination clause must be complied with exactly and meticulously' for the termination to be successful.

The arbitrator had misconducted himself when he construed cl 26(1)(a) in the manner he did, and is also guilty of being biased in selectively choosing evidence to support his findings. It is abundantly evident that the notice of 10 December 1997 (p 194, encl 2) is defective in law. The first respondent admits in his submission that it had not received 20% amounting to RM191,677.28 from Showa, but the notice (BHT–8, p 194, encl 2) states that the claimant had defaulted in payment of interim certificates 9 and 10, amounting to RM822,681.18. There was no default in payment of this sum to the respondent. Notice of determination must clearly specify the default of the employer. 'Exact and meticulous compliance by the determining party with any formal or procedural requirements laid down in the termination clause must be followed' (*Fajar Menyensing Sdn Bhd*). The applicant in its submission and in the course of the arbitration hearing, raised the issue of estoppel; the first respondent being estopped from reverting to the factoring arrangement as per his notice of 10 December 1997 after the first respondent had received full payment on Certificate No 12 directly from the applicant. This payment was made to keep the contract between the claimant/applicant and the first respondent intact so that the project could be completed. This essential

issue was not even referred to by the arbitrator in his award. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 AMR 2871, it was held at pp 2885–2886:

> (iii) where estoppel is not pleaded, but there is admitted, without any objection, a body of evidence to support the plea, and argument is directed upon the point. The court then has a duty to consider the evidence and the submissions, and come to a decision on the issue.

In the instant case, one has merely to ask the question, did the arbitrator in his award, at least refer to or consider this submission?

The arbitrator failed to perform the essential duties cast on him as an arbitrator, failed to observe the rules of natural justice in arriving at his award and had shown bias, impartiality and irregularity of action which goes against the principle of equity and good conscience. In the above premise, the arbitrator is guilty of misconduct, resulting in a substantial miscarriage of justice and his award published on 20 June 2000 is hereby set aside under s 24(2) of the Arbitration Act 1952, with costs to be paid by the respondent to the claimant. An order in terms of (a) of the motion is hereby granted.

Application allowed.

Reported by Wong Siok Chin